CHIN CHEN FUI

v.

MAJLIS PERBANDARAN SANDAKAN

HIGH COURT BORNEO, SANDAKAN
ABU MANSOR ALI J
[CIVIL SUIT NO. S. 164 OF 1985]
1 DECEMBER 1987

CONTRACT: *Contract of employment with local authority - Who is the employer - Local authority or state government - When the contract frustrated - Section 63 of Local Government Ordinance - Section 29(3) Interpretation and General Clauses Enactment (Sabah).*

By a summons-in-chambers under O. 14, Rules of the High Court 1980 the plaintiff applied for final judgment against the defendants for an amount claimed in the statement of claims. It was not disputed that the plaintiff a qualified architect was appointed as Timbalan Presiden (1) of the Majlis Perbandaran Sandakan. The Minister of Town and Country Development had approved the creation of the post of Timbalan Presiden (1) in the Majlis Perbandaran Sandakan. The Minister had also approved the plaintiff's appointment on contract for two years. The appointment was endorsed by the President of the Majlis Perbandaran. The plaintiff was put to work, to study and review the local authority's administration and financial management. Subsequently the Permanent Secretary to the Minister by letter to the President of the Majlis Perbandaran Sandakan withdrew the plaintiff's appointment to study and review the administration and financial management of the Sandakan Council. The plaintiff was informed of this. Sometime later the said Permanent Secretary wrote to the said President directing him to terminate the plaintiff's appointment which was done.

It was argued that

(a) The plaintiff was not employed by the defendant but the State Government of Sabah.

(b) The withdrawal of the plaintiff's appointment by the Minister amounted to frustration of the contract.

Held:

[1] The Sandakan Municipal Council was a financially autonomous authority and it could be assumed that the plaintiff's salary was paid from the Council's funds. The appointment of the plaintiff by the Minister was only the mode of appointment but once appointed since his salary was paid out of Council's funds, he was the employee of the defendants.

[2] The withdrawal of the work of review did not destroy the contract of employment. It was only a step towards his dismissal and did not strike at the root of the contract. There was no frustration of the contract.

[3] The contract had been breached by the defendant and judgment will be entered against the defendant in amount in the statement of claim with interest and costs.

[Judgment for plaintiff.]

Case referred to:
Ramli bin Zakaria & Ors. v. Government of Malaysia [1982] 2 MLJ 257

Legislation referred to:
Interpretation and General Clauses Enactment (Sabah), s. 29(3)
Local Government Ordinance 1961 (Sabah), ss. 53, 63
Rules of the High Court 1980, O. 14

For the plaintiff - Vallentine Willie; M/s. Skinner Lind Robertson Willie Wong Chin & Co.
For the defendant - Raymond Tan; M/s. Chin Lau Wong & Foo Co.

JUDGMENT

Abu Mansor Ali J:

By their summons in chambers under O. 14, Rules of the High Court 1980 dated 17 January 1986, the plaintiff applied for final judgment against the defendants for an amount claimed in the statement of claim. The application is supported by the affidavit of the plaintiff. After hearing arguments I reserved judgment to a date to be fixed.

The facts of this case are as set out in the supporting affidavit of the plaintiff. Plaintiff is a qualified architect. Upon his return from studies he was appointed to various posts in Sabah. Prior to the appointment as Timbalan Presiden (1) of the Majlis Perbandaran Sandakan, which is the subject of the present dispute, he was President of the Labuan Municipal Council.

It is not disputed that on 17 January 1985 the then Chief Minister of Sabah, Datuk Harris Mohd. Salleh, asked the plaintiff to submit his proposal of the terms and conditions for appointment as Timbalan Presiden (1) of the Majlis Perbandaran Sandakan for a period of two years (CCF.5). He did so and on 17 January 1985 the said Chief Minister agreed to the terms by minuting "Dipersetujui - sila uruskan." It is also not disputed that the letter CCF5 contained all the terms and conditions of the plaintiff's appointment from his salary to all the other benefits.

Thereafter followed the various correspondence from the Chief Minister's office to the Minister of Town & Country Development and what is also not disputed is the letter dated 1 February 1985 (CCF7) from the said Ministry to the President of the Majlis Perbandaran Sandakan whereby the Minister approved the creation of the post of Timbalan Presiden (1) in the said Majlis Perbandaran. By this token the Minister also approved the plaintiff's appointment on contract for two years with all the terms as in CCF5 with effect from 22 January 1985 (CCF7). The plaintiff's appointment was endorsed by the President of the Majlis Perbandaran on 15 February 1985 by the usual minute to take "tindakan". Plaintiff had also to resign his substantive post in the civil service in order to take his appointment in Sandakan and the defendant duly put the plaintiff to work, as required by the State Government, to study and review the local authority's administration and financial management. He was properly remunerated according to the terms and conditions agreed to.

It is further not disputed that by letter dated 26 April 1985 from the Permanent Secretary to the Ministry of Town & Country Development to the President of the Majlis Perbandaran Sandakan (CCFL5) the State Government withdrew the plaintiff's appointment to study and review the administration and financial management of the Sandakan Council with immediate effect. Following from this on 6 May 1985 the President of the Municipal Council Sandakan wrote to plaintiff enclosing a copy of the Ministry's letter of withdrawal dated 26 April 1985. Then by a letter dated 6 May 1985, the Permanent Secretary to the Ministry of Local Government & Housing wrote to the President, Majlis Perbandaran Sandakan, directing him to terminate the plaintiff's appointment as Timbalan Presiden (1) of the Majlis Perbandaran Sandakan without prior notice and he be given one month's pay in lieu thereof. Upon

plaintiff's dismissal a sum of RM8,562.06 was paid into his account representing one month's pay in lieu. He was asked to vacate his quarters. He sustained loss of benefits he enjoyed as a result of the termination of his appointment. His total claim is as stated in his statement of claim. He tried to mitigate his damage by applying for alternative posts but without success.

Turning to the arguments in open Court, Mr. Willie, for the plaintiff, repeated all the facts above which the defendants did not dispute. Plaintiff's Counsel went on to say that from the facts as given there was clearly a contract of employment of the plaintiff by the defendant on terms with all those benefits attached to such employment commencing on 22 January 1985 and on 6 May 1985 there was dismissal of the plaintiff.

Mr. Raymond Tan for the defendants argued that the defence case was that the plaintiff was not employed by the defendants but by the State Government of Sabah. He went on to argue that the defendant is a creation of statute from which it obtains its powers. Before there can be appointment of the plaintiff the appointment must be approved by the Ministry of Local Government & Housing and in fact in the present case approval was indeed obtained (CCF7) for the plaintiff's appointment as Timbalan Presiden (1). The defendant submitted, there was withdrawal of the plaintiff's appointment by the Minister of Local Government & Housing, and the contract was frustrated. In order that the matter may be properly argued, on their application, the defendant was allowed to amend their defence to include the defence of frustration. It is not disputed that in para. 3 of the Sandakan Municipal Council's President's affidavit affirmed on 18 February 1986 he deposed that the Minister of Local Government & Housing *vide* his letter of 6 May 1985 withdrew the plaintiff's appointment and as such he could no longer serve. The defendant contended, disputed by the plaintiff, that the withdrawal of the plaintiff's that the withdrawal of the plaintiff's appointment amounted to frustration of the contract. Such being the case, the defendants say they are not liable for the determination of the service of the plaintiff. I will deal with the question of in whose employment the plaintiff was during the relevant period we are considering. After having heard the parties I am of the firm view the plaintiff was in the employment of the defendants and not that of the State Government.

The Sandakan Municipal Council was set up by the Sandakan Municipal Council Instrument ("the Instrument") under the hand of the Yang Di-Pertua Negeri in 1983 by virtue of the Local Government Ordinance 1961. Under cl. 8 of the said instrument, the Vice-President shall be appointed by the Minister for such period being longer than one year as he may determine and such persons shall be members of the State Public Service. It would appear that under s. 53 of the Local Government Ordinance 1961 the Sandakan Council has its own funds to which revenues are put in and expended. Under s. 63 of the said Ordinance the council is obliged to pass, not less than three months before the expiry of each financial year, detailed estimates of the revenue and expenditure for the next financial year. From the above, it would be safe to assume that the Sandakan Municipal Council is a financially autonomous authority and it would be also safe to assume that the plaintiff's salary was paid from the Council's fund. From the above, I also find that the appointment of the plaintiff by the Minister is only a mode, of making the appointment but once appointed it is clear that, since he is paid out of the Council's fund, he is the employee of the Sandakan Municipal Council. In a similar way when the Public Service Commission makes the appointment to government service the employee in no way becomes the employee of the Public Service Commission.

I will now deal with the defendant's defence of frustration. When the State Government Minister concerned withdrew the appointment of the plaintiff to do the review of the Sandakan Municipal Council's administrative and financial management could it be interpreted that the

contract of employment of the plaintiff with the defendant had been frustrated? The defendant said it did so whereas the plaintiff said it did not. In *Ramli bin Zakaria & Ors. v. Government of Malaysia* [1982] 2 MLJ 257, the Federal Court held:

> (1) where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration;

To my mind whether the withdrawal of the work of review by the Minister amounted to frustration of the contract would certainly depend on the view one takes of the effect of the Minister's direction on the subsisting contract of employment between the plaintiff and the defendant. I take the view the Minister's withdrawal of the plaintiff's work in doing the review did not destroy the contract of employment. The withdrawal was only a step towards his dismissal and did not strike at the root of the contract he entered with the defendant. He could easily be put to do other duties and the contract can still be performed. If he was to be dismissed, I am of the view that the prime mover for his dismissal would still be his employer, the defendant, since s. 29(3) of the Interpretation and General Clauses Enactment (Sabah) says:

> Where any State law confers upon any authority a power to make appointments to any office or place, the power shall, unless the contrary intention appears, be construed as including a power to dismiss or suspend any person appointed and to appoint another person temporary in the place of any person so suspended or in place of any sick or absent holder of such officer or place:
>
> Provided that where the power of such authority to make such appointment is only exerciseable upon the recommendation, or subject to the approval or consent, of some other authority, the powers conferred by this subsection shall, unless the contrary intention appears, only be exerciseable upon such recommendation or subject to such approval or consent.

The defendant with the concurrence of the Minister could decide that his services be terminated but before that is done the defendant would certainly have to contend with and have regard to the existing contract of employment with the plaintiff. Should the defendant fail to do so, then he must pay the penalty. I am of the view since the defendant did not have regard to the contract existing between them and the plaintiff they have therefore committed a clear breach of the contract.

In giving this judgment I am not unmindful of the submission made before me by learned Counsel for the defendant when he submitted that they have managed to raise issues of law as regards the issue of frustration of the contract. Having considered this matter I am of the view the contract between the defendant and plaintiff has not been affected by frustration for reason given. To my mind this is a clear matter of a breach by the defendant in terminating the plaintiff's subsisting contract for which there is no available defence and I, therefore, order judgment for plaintiff against the defendant in amount in the statement of claim with interest and costs.

Also found at [1988] 2 CLJ 291